the course of events set up by a prior cause as to make the latter remote from the result of it.[13] The one subject to the duty ought to act, and thereby put an end to the force started by the original actor, or so deflect the force as to prevent the injurious result. By failing to act and to intervene in the course of events, he allows the force of the original actor to continue unchecked and undeflected until it directly results in the injury complained of. The failure to act, instead of interfering with the operation of the original force, has wrongly failed to do so.

A recent case in the Supreme Court of the United States, *Union Pacific Railroad Co.* v. *Hadley*, 38 Sup. Ct. 318, brings out this point very neatly. A brakeman, injured by a rear-end collision, had neglected his duty of going back to signal the following train. It was held that the negligence of the company in running the following train was a proximate cause of the injury, and the brakeman was allowed to recover upon the Federal Employer's Liability Act. This decision, in view of the considerations stated above, seems to be thoroughly sound even though, as Mr. Justice Holmes pointed out, the negligence of the brakeman should be deemed "the logical last."

It is to be noticed that in such a case, in spite of the fact that the defendant is a proximate cause of the result, an individual plaintiff who has neglected to act as he should do is usually barred from recovery because of his own contributory negligence or because the consequence in question was avoidable. In the case under discussion the plaintiff would be barred from recovery if the Employers' Liability Act had not abolished the defense of contributory negligence.

THE VIRGINIA–WEST VIRGINIA DEBT CONTROVERSY. — The Supreme Court has left open a point of exceptional interest in holding over for reargument the rule requiring West Virginia to show cause why in default of payment of the judgment in favor of Virginia an order should not be entered directing the levy of a tax by the legislature, and a motion by West Virginia to dismiss the rule.[1] The decision by the chief justice points out that Congress as required by the Constitution ratified the agreement by which West Virginia assumed its proportional share of the debt of Virginia and indicates his opinion that under the doctrine of *McCulloch* v. *Maryland*[2] Congress has the power to enforce its performance. But in the absence of congressional action has the Supreme Court power to mandamus the legislature of West Virginia to levy a tax to pay its obligation? The argument in the affirmative suggested by the court, is that the grant to the judicial power of jurisdiction to determine controversies between two or more states must have been an effectual grant, and that the power to pronounce judgment must include the power to enforce the judgment. But such reasoning though persuasive is not conclusive. Words have no absolute meaning, but

[13] Regina *v.* Holland, 2 Moo. & R. 351 (1841).

[1] Commonwealth of Virginia *v.* State of West Virginia, 38 Sup. Ct. 400 (1918).

[2] 4 WHEAT. 316 (1819).

must be interpreted in the Constitution as elsewhere in the light of history and policy. Thus the prohibition of involuntary servitude though absolute in terms, does not prevent compulsory military service.[3] The history of the Fourteenth Amendment is an epic of interpretation from the points of view of both history and the growth of political theory.[4]

That judicial power should as a general proposition include the power to enforce its judgments is obviously necessary to obtain justice from the imperfection of human nature. But jurisdiction has been taken and judgments rendered in a class of cases where the power to enforce them has existed so entirely in theory alone as to raise doubts that it existed at all. In *The Spanish Ambassador* v. *Bingley*[5] it was decided that a foreign sovereign might bring a bill in chancery. *The Colombian Government* v. *Rothschild*[6] held that he must bring it in such a way — by some public officer or otherwise — that justice could be done the defendants in case they chose to bring a cross bill. In *Hullett* v. *King of Spain*[7] the Spanish Government had deposited money in London which it had received from France to hold in trust for Spanish subjects having claims against the French government under a treaty. The money was also on deposit as security for performance by Spain of its obligations. The court interpreted the various treaties and decreed payment to the King of Spain. If we may suppose for a moment the intervention of the *cestuis que trust* and the French government and the necessity of a decree ordering the disposition of the fund according to a view of the treaty which neither France nor Spain could accept, the difficulties of enforcement in anything more than a highly technical sense are clearly discerned.[8] The fact is that the courts go, and must go, in these cases on the theory which one of our own judges has expressed that they cannot presume that a sovereign state will knowingly disobey the judgment of the court and do injustice.[9] And though at first blush this appears the thinnest fiction, it would seem to be on a sound basis. For the function of the courts is to determine the rights of the parties; and though in the common run the coercive power is merely an adjunct to judicial administration, a vast increase in the degree may make a difference in kind and change a question of judicial administration to one of political expediency. It may well become one of those questions, which, in the language of the Duke of York's Case, is "too high" for the court.[10] Such under our own Constitution is the question of the existence of a state government.[11] And it may be argued that the decision whether any state government is or is not republican in form is of the same nature and must be made by Congress and not by the court.[12] So also, it would seem, is

[3] Emma Goldman and Alexander Berkman *v.* United States, 38 Sup. Ct. 166 (1918).

[4] Holmes, J., dissenting, in Lochner *v.* New York, 198 U. S. 45 (1905).

[5] Hob. 113.

[6] 1 Sim. 94.

[7] 2 Bligh (P. C.) (N. S.) 31.

[8] See also and compare Nabob of the Carnatic *v.* East India Co., 1 Vesey, 371, and Nabob of the Carnatic *v.* East India Co., 2 Ves. Jr. 56.

[9] Massachusetts *v.* Rhode Island, 12 Pet. 657, 750 (1838).

[10] Rotuli Parliamentorum, 375; Wambaugh's Cases on Constitutional Law, 1.

[11] Luther *v.* Borden, 7 How. 1 (1849).

[12] Pacific States Tel. & Tel. Co. *v.* Oregon, 223 U. S. 1 (1911).

this question as to what method to pursue to force one of our partially sovereign units to pay a debt due to another. The decision should be made by the representatives of the entire people and then enforced by all the processes which the court has at its command.

Historically the case for the existence of this power in the court is no better.

The pre-Revolutionary period gives us little help. The jurisdiction of the English courts was extremely narrow, the mass of appeals being decided by the administrative committee of the Privy Council in charge of Plantation Affairs.[13] Furthermore, the theory was fundamentally different, being that of a sovereign administering dependencies. The Articles of Confederation, however, provided that Congress should be the "last resort on appeal" in cases of disputes between the states.[14] The method of settlement included a notification of the parties to appear, and a direction by Congress that they should appoint judges "who shall constitute a court for determining the matter." In case of failure to agree an elaborate system was provided for appointing judges "to hear and finally determine the controversy." The judges were to report their decision to Congress, which entered it among its acts as "security for the parties." In essence the scheme was that in case of controversy Congress should by law create a court to decide the case. The court performed the judicial function. Then Congress enacted the decision to give security to the parties. The enforcement was clearly by legislative process, if enforcement was necessary.

In view of this situation what power of enforcement is implied in the provision that judicial power shall extend to controversies between two or more states? [15] Formerly in such cases the judicial function had been performed by a court which admittedly had no power to enforce. And we have seen that coercion even to secure justice may develop into a purely political matter. In *The Cherokee Nation* v. *Georgia*,[16] Chief Justice Marshall said, "that part of the bill which respects the land occupied by the Indians and prays the aid of the court to protect their possession may be more doubtful. The mere question of right might, perhaps, be decided by this court in a proper case with the proper parties. But the court is asked to do more than decide on the title. The bill requires us to control the legislature of Georgia and restrain its physical force. The propriety of such an interposition by the court may well be questioned. It savours to much of the exercise of political power to be within the province of the judicial department." As bearing on the general belief of the Constitutional Convention as to the coercive power of the judiciary over the states, it is interesting to note that while that department was early given jurisdiction over cases where foreigners were interested in treaties, yet in all drafts up to the final formulation the executive was required to coerce any state which opposed the execu-

[13] The King's Bench had *jurisdiction* only in cases of *quo warranto*, and Chancery only in cases between Lords Proprietary as private subjects. See Massachusetts *v.* Rhode Island, 12 Pet. 657, 739 (1838); SNOW, ADMINISTRATION OF DEPENDENCIES, chap. V.

[14] Article IX.

[15] CONSTITUTION OF UNITED STATES, Article III, § 2.

[16] 5 Pet. 20 (1831).

tion of a treaty.[17] It is also significant that for some time the convention was inclined to reserve disputes between the states in regard to territory and sovereignty — which of all would have seemed the only ones which might need enforcement — for the Senate.[18] And when the broad grant of jurisdiction to the judicial power was finally made we find a contemporary diarist noting that it extended to all controversies of a legal nature between the states.[19] Granting as we do that all disputes between units of a federation are justiciable we may also insist that the coercion of a unit may well be beyond the limitation implied in the words "of a legal nature." Otherwise it would be difficult to explain why so bitter an opponent of Article III as Luther Martin — who also desired that rebellion under state authority should not be treason[20] — took no exception to this grant of power.

It would not seem unreasonable, then, to believe that neither the framers of the Constitution nor subsequent judicial expounders considered that the court had this enforcing power over the states in the absence of a direction by Congress. It is clear both from the history of the case and the language of the opinion that the court finds weighty considerations of policy against claiming it now. Where both historical authority and long judicial practice can consistently join with sound political policy it is well gratefully to declare the union.

SUIT UNDER FOREIGN STATUTE GIVING PERSONAL REPRESENTATIVE THE RIGHT TO RECOVER FOR DEATH BY WRONGFUL ACT. — In considering the subject of statutory right of action for death by wrongful act three questions in the main present themselves: (1) Where may such an action be maintained? (2) In what capacity does the personal representative bring suit? (3) As properly construed, what is the scope of the term "personal representative" as used in these so-called "death statutes"? In general, these questions have not been answered by the courts in a wholly satisfactory manner. It will be profitable to set forth what is conceived to be the correct way of dealing with the subject on principle as illustrated by the more satisfactory decisions, before indicating the effects produced by erroneous theories.

Despite its statutory origin, the right of action for death by wrongful act should be placed in the category of transitory actions on which suit may be maintained in any tribunal having jurisdiction over the person of the defendant. This proposition, sustained by the weight of authority,[1] is of course subject to the qualification that the foreign statute creating the right must be consistent with the policy of the *lex fori*.

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[17] FARRAND, THE RECORDS OF THE FEDERAL CONVENTION, Vol. I, 245, 247; Vol. II, 157.

[18] FARRAND, *supra*, Vol. II, 160, 170, 183, 186.

[19] FARRAND, *supra*, Vol. III, 169.

[20] FARRAND, *supra*, Vol. III, 223.

[1] Dennick *v.* Ry. Co., 103 U. S. 11 (1880); Knight *v.* Ry. Co., 108 Pa. 250 (1885). *Contra*, Wabash Ry. Co. *v.* Fox, 64 Ohio St. 133, 59 N. E. 888 (1901); Richardson *v.* N. Y., etc. Ry. Co., 98 Mass. 85 (1867). See TIFFANY, DEATH BY WRONGFUL ACT (2 ed.), §§ 196, 198.